LAU CHOON LIONG

v.

PAUL LING TECH YIU

HIGH COURT, SABAH & SARAWAK
CHONG SIEW FAI J
[SUIT NO. 66 OF 1987]
19 OCTOBER 1988

CIVIL PROCEDURE: *Injunction - Granting of interlocutory injunction - Restraining defendant from further publishing, issuing or circulating libellous articles - Defendant gave an undertaking refraining from publication - Subsequently, however defendant issued another letter.*

The plaintiff, following the institution of this action applied for interlocutory injunction to restrain the defendant from publishing, issuing or circulating libellous articles. The application did not go into full hearing since the defendant gave an undertaking refraining from publication. Subsequently, however, the defendant issued another letter to which the plaintiff took exception. A motion for committal of the defendant was taken out. However, that motion was dismissed. This application for injunction was subsequently taken out.

Held:

[1] The plaintiff can re-open the matter and apply for fresh injunction even though the defendant gave an undertaking from publication on a previous application for an injunction in the same action.

[2] Having considered the submission and evidence adduced by both sides it is just and proper that the injunction be granted.

[Application allowed.]

Cases referred to:

G.C.T. (Management) Ltd. v. Laurie Marsh Ground Ltd. [1973] RPC 432
Coulson v. Coulson [1887] 3 TLR 846
Bonnard v. Perryman [1891] 2 Ch 269
The New Straits Times Press (M) Bhd. v. Air Asia Bhd. [1987] 1 MLJ 36

Other source referred to:

Gatley on Libel And Slander 8th Edn., paras. 1571-1574, 1577, 1578

JUDGMENT

Chong Siew Fai J:

This is an application by the plaintiff seeking, *inter alia*, to restrain the defendant from further publishing, issuing or circulating the libel complained of in this action or any other similar libel until the hearing of this action or until further order.

The principles governing the grant of interlocutory injunctions may be found in s. 1 of Chapter 35 of *Gatley on Libel And Slander* 8th Edn., paras. 1571 to 1574, 1577 and 1578 are of particular relevance to the instant application. These, however, are general principles. Each case must be considered in the light of its own facts.

I would, first, briefly relate the relevant history of the case leading to the making of this application. Following the institution of this action, the plaintiff applied for interlocutory injunction to restrain the defendant. The application did not go into full hearing since the defendant gave an undertaking refraining from publication. Subsequently, however, the defendant issued another letter to which the plaintiff took exception. A motion for committal of the defendant was taken out. For reasons which need not be gone into here, that motion was dismissed. This application was subsequently taken out. The letter, it may be noted, has formed the subject-matter of another libel action between the parties hereto. (Suit No. 163/1987).

Relying on *G.C.T. (Management) Ltd. v. Laurie Marsh Group Ltd.* [1973] RPC 432, the defendant argued that since an undertaking had been given by the defendant, the plaintiff could not reopen the matter and apply for the relief sought. I am unable to agree. *G.C.T. (Management) Ltd.* was a passing-off action involving the use of a certain name. Different considerations applied. In our instant case, it cannot be doubted that the intention of the plaintiff all along has been to restrain the defendant from further issuing, publishing or circulating the libel complained of or any other similar libel. This is clear from the plaintiff's application dated 21 April 1987 where the words: "... libel... or any other similar libel" were used. The defendant's undertaking dated 14 July 1987 were couched in similar material wording which I wrote at the hearing on 25 May 1987. The plaintiff in the present application is also asking for the discharge of that undertaking and for it to be replaced by an interlocutory injunction relief obviously having regard to what had occurred after 25 May 1987 involving the letter that formed the subject-matter of the Suit No. 163 of 1987.

The words complained of and contained in the defendant's letter dated 9 March 1987 (see para. 3 of the statement of claim) are clearly defamatory in nature. The 1st para. of the words complained of is a statement of fact and the 2nd para. thereof is comment. Taking the letter as a whole, it is reasonable to conclude that the comment rests mainly, if not wholly, on the alleged statement of fact.

The defendant raised the defences of justification and fair comment. (See para. 16 of his affidavit made on 2 April 1988 and para. 6 of the defence dated 4 June 1987). However, in the last sentence of the said para. 16 of his affidavit, the defendant affirmed merely to his **belief** as opposed to affirming ability to justify the words complained of. He deposed: I honestly and reasonably believe that the words contained in these two letters are true in substance and in fact and are my fair comment on a matter of public interest...

The defendant related to matters attempting to show justification (paras. 3 to 15 of the said affidavit). But the matters deposed show on the face of it that Public Works Department had agreed to the Variation Order No. 26 because of the change of building materials i.e. galvanized steel tanks to **pressed** steel tanks, and the defendant's grievance appears to be due to the plaintiff being able to get the variation order for the change while he and others could not. (Paragraphs 9 - 11 of the said affidavit). In para. 14 of the said affidavit, the defendant seemed to say that his allegation of the plaintiff being corrupt was based on item 5 of the minutes of the 2nd site meeting in Exh. 'E' annexed to Mr. Peter Yip's affidavit made on 29 February 1988 which stated:

> EE (W & D) informed contractor M/s Lau Tiong Ik that a VO will be prepared for changing from galvanised steel tanks to pressed steel tanks.

But the said Exh. 'E' is a copy of the minutes showing what purportedly have taken place in a meeting that at least, on the face of it, appears to be regular. In itself, it gives no indication of collaborating to swindle the Government contract money as alleged by the defendant. The evidence adduced for the purpose of this application and without more would in all probability fall short of making out a case of justification, and suggest that the statement complained of is untrue. It, at least, is capable of more than one interpretation not all of which establish the defence of the defendant. In the defendant's own submission he also referred to the question of cautiousness in issuing Variation Order No. 26 and fair value. (See defendant's written submission DEFI para. 12). In his written submission DEF2 para. II, he further stated that if there was no corruption, he was only exposing irregularity and partiality of the Public Work Department.

As regards the defence of fair comment, since the materials relied on to establish justification stand on rather shaky grounds (at least on the evidence adduced), the plea of fair comment necessarily loses its sting.

Though the defendant has pleaded qualified privilege in his defence, no or hardly any evidence was adduced in support for the purpose of this application. Moreover, privilege, as pleaded, even if there is, appears to have been exceeded. Despite the defendant's explanation, the letter dated 9 March 1987 and complained of was stated to be freely distributed. On the available evidence, malice might well be inferred.

The fact that the defendant, after the institution of this action and despite the undertaking given on 14 July 1987, proceeded to further issue and publish the letter dated 23 July 1987 copied to various others (Exh. A annexed to Mr. Peter Yip's affidavit made on 29 February 1988) affords strong indication that he would, unless restrained, continue to make further publication. In this connection, I am not impressed by the defendant's assertion that his two letters dated 9 March 1987 and 23 July 1987 respectively were inter-related. (Paragraph 16 of the defendant's affidavit made on 2 April 1988). As stated above, the second letter was written after the undertaking was given. Furthermore, in the last paragraph of Exh. PL15 annexed to his affidavit made on 2 April 1988, the defendant admitted having openly accused the plaintiff of corruption. And, the said letter, be it noted, was stated as having been copied to: All SMC Councillors ...And to be freely distributed. In his letter dated 23 July 1987, the words therein complained of are also indicative that the defendant would probably not leave the matter at rest till the trial of this action. The evidence strongly suggests the existence of real threat that the defendant would further publish the words complained of or words to the like effect.

On the evidence the plaintiff is in building business and is a Municipal Councillor. The words complained of or words to the like effect clearly would cause immediate and irreparable injury to him if further publication were to continue. In this respect, I am unable to accept the defendant's seeming contention of his belief that the words complained of would not cause the plaintiff any damage or harm.

I bear in mind that the jurisdiction to grant the interlocutory injunction as sought is to be exercised with great caution and only in clearest cases *Coulson v. Coulson* [1887] 3 TLR 846 as approved in *Bonnard v. Perryman* [1891] 2 Ch. 269. See also *The New Straits Times Press (M) Bhd. v. Air Asia Bhd.* [1987] 1 MLJ 36 SC. While freedom of speech is an element to be considered, it must be weighed against the whole circumstances and facts of the case including the strength of the defendant's case, the reputation of the plaintiff and the irreparable injury and damage that would be caused to the latter.

Having heard Counsel for the plaintiff and the defendant, and having considered the evidence adduced by both sides, I am satisfied that it is just and proper that the application in terms of prayers (a), (c) and (d) be allowed. In the exercise of the discretion of the Court and subject to the undertaking hereinafter stated to be given by the plaintiff, I grant them. The undertaking to be given by the plaintiff is that he is to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant shall have sustained any such damage by reason of the order of restrain herein granted which the plaintiff ought to pay.

Also found at [1989] 2 CLJ 529